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Supreme Court, U.S.
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No. 93-1363

In the Supreme Court of the United States

OCTOBER TERM, 1993

PROTECT KEY WEST, INC., D/B/A LAST STAND,
PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, where a complaint includes a demand for attorneys' fees, the district court must wait for the submission of an application for attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412(d), before finding the position of the government substantially justified.

2. Whether the district court abused its discretion in finding that the position of the government was substantially justified.

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OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. 1a), but the judgment is noted at 11 F.3d 166 (Table). The initial opinion of the district court (Pet. App. 9a-39a) is reported at 783 F. Supp. 546. The two subsequent decisions (Pet. App. 2a-4a, 5a-6a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1993. The petition for a writ of certiorari was filed on March 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Petitioner is a non-profit environmental group located in Key West, Florida. On June 4, 1991, petitioner filed suit against respondents in the United States District Court for the Southern District of Florida, alleging violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, regulations implementing NEPA, and the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.* The alleged violations con-cerned the Navy's preparation of an Environmental Assessment (EA) for a housing project known as Peary Court, located in Key West, Florida. Petitioner's complaint included a demand for attorneys' fees and costs. Pet. App. 10a, 40a. The Navy responded that studies, surveys and investigations conducted after the decision was made to proceed with the Peary Court project "cured" any defects in the original EA. Gov't C.A. Br. at 7-8.

The district court referred petitioner's motion for a preliminary injunction to a magistrate judge for a report and recommendation. The magistrate judge recommended denial of preliminary injunctive relief and petitioner subsequently moved the district court for a temporary restraining order (TRO). Pet. App. 11a. The district court granted a TRO preventing the Peary Court project from going forward and held a trial on the merits. *Ibid.*

On March 30, 1992, the district court issued its opinion and order. The court held that the Navy's EA was inadequate and required the Navy to prepare a new "Environmental Assessment in conformity with 42 U.S.C. §§ 4321 *et seq.* and regulations promulgated thereunder." Pet.

App. 37a-39a.[1] In concluding its March 30 Order, the court declared the case "dismissed," ordered the Clerk of the Court to "close this case," and stated that "each party shall bear its own cost and attorneys' fees of this litigation, as Defendants' litigation position was substantially justified." *Id.* at 38a.

b. Petitioner did not file a motion to alter or amend the judgment. See Fed. R. Civ. P. 59(e). Nor did petitioner file a notice of appeal within 60 days of the district court's opinion and judgment. Pet. App. 38a; see Fed. R. App. P. 4(a). Instead, petitioner filed an application for $36,691.87 in attorneys' fees on May 14, 1992. Pet. Application for Attorneys' Fees at 1. Petitioner sought fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), which provides that a court "shall award to a prevailing party other than the United States fees and other expenses * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make the award unjust."

Petitioner's application for EAJA fees was supported by an affidavit from Joel H. Sachs, one of petitioner's attorneys. Mr. Sachs averred that petitioner was entitled to attorneys' fees because "[a] review of the record will disclose that plaintiff was the prevailing party and that

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[1] The March 30 Order also stated that the Peary Court project "is a major federal action that will significantly affect the environment." Pet. App. 13a. On April 9, 1992, the Navy filed a "Motion for Amendment of March 30 Order" requesting that the court delete this language as inconsistent with the ultimate remedy required by the court and with the court's holding elsewhere in the opinion that it would not determine whether the project has significant impacts on the environment. *Id.* at 41a-42a. On April 10, 1992, the district court amended the sentence in the opinion to read: "[t]he Court finds that this project, known as Peary Court, is a major federal action." *Id.* at 7a-8a.

the litigation position of the defendants was not substantially justified." Affidavit of Joel H. Sachs at 3. The government opposed petitioner's application, arguing that the district court had already held that the litigation position of the government was substantially justified and that petitioner had failed to move to alter or amend the court's judgment within the time allowed by the Fed. R. Civ. P. 59(e).

On May 26, 1992, the district court denied petitioner's application for attorneys' fees. Pet. App. 5a-6a. The court explained that in its prior order it had "found that [the] defendant's litigation position was substantially justified." *Id.* at 5a.

c. Six weeks later, petitioner filed a motion, pursuant to Fed. R. Civ. P. 60(b), for relief from the May 26 Order denying attorneys' fees. Petitioner alleged that the district court should have awarded it attorneys' fees because neither the underlying agency actions nor the litigation position of the government was substantially justified. The court denied petitioner's motion in an Omnibus Order on Plaintiff's Motion for Reconsideration, Pet. App. 2a, which again found that "the government's position was substantially justified in these proceedings." *Id.* at 3a. The court held that "[t]he government's theory of 'cure,' although ultimately rejected by this Court, had a reasonable basis in law and fact." *Ibid.*

2. Petitioner appealed from the district court's order of May 26, 1992, and "Omnibus" order of August 13, 1992. The two appeals were consolidated by the court of appeals.[2]

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[2] The United States did not appeal the court's NEPA holding, but instead prepared a new EA pursuant to the court's order. Petitioner challenged this new EA but the district court ruled that

Petitioner contended before the court of appeals that the district court abused its discretion by denying petitioner attorneys' fees "for the sole reason that the government's litigation position was substantially justified." Pet. C.A. Br. 1. Petitioner urged that the Navy's underlying actions were unreasonable and that attorneys' fees should therefore have been awarded. *Id.* at 8.

The government responded that petitioner's failure to take a timely appeal from the district court's holding that the litigation position of the government was substantially justified barred appellate review of that finding. In the alternative, the government argued that both the government's underlying actions and its litigation position were substantially justified.

The court of appeals affirmed without opinion. Pet. App. 1a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 5-8) that the district court did not have jurisdiction over its attorneys' fee demand until it submitted a separate application for attorneys' fees, and that the district court's initial finding that the litigation position of the government was "substantially justified" was therefore without effect. In support of this argument petitioner (Pet. 6) relies on a number of cases that have held that a timely application for EAJA fees is a jurisdictional prerequisite to an award of attorneys' fees. See, *e.g.*, *Myers* v. *Sullivan*,

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the EA was adequate. *Protect Key West* v. *Cheney*, No. 92-10043, Order of Sept. 30, 1992 (S.D. Fla.).

916 F.2d 659, 666 (11th Cir. 1990); *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985). However, none of the cases cited by petitioner considers the issue raised here: whether a district court may determine that the position of the government is substantially justified prior to the submission of a separate application for attorneys' fees, when the plaintiff has included a demand for fees in its complaint.[3] Nor has our research uncovered any other decision addressing this issue. Since petitioner's complaint included a demand for attorneys' fees, the district court's decision to rule on that request was entirely reasonable.

2. Petitioner also errs in contending (Pet. 8) that the district court's denial of attorneys' fees conflicts with this Court's decision in *INS* v. *Jean*, 496 U.S. 154 (1990), because the district court did not consider whether the agency's actions were substantially justified in assessing petitioner's motion for attorneys' fees. Petitioner asserts (Pet. 9) that the district court's judgment on the merits "belies any assertion that the agency's actions were substantially justified under 28 U.S.C. § 2412(d)(1)(A)." The district court expressly found, however, that "the government's position was substantially justified." Pet. App. 3a. This finding was fully supported by the record before the district court.

This Court has held that the government's position is substantially justified if it has a reasonable basis in law and fact. *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988). The position need not be "justified to a high degree";

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[3] None of the cases relied on by petitioner in this Court for the proposition that the district court lacked jurisdiction over the fee request until a fee application was filed was cited to the court of appeals. See Pet. C.A. Reply Br. In fact, petitioner barely raised this jurisdictional argument in the court of appeals. *Id.* at 4-5.

rather, it only need be " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Ibid.* A "position can be justified even though it is not correct, and * * * can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.2.

Here, the Navy's good faith belief, from the commencement of the Peary Court project and throughout the litigation, was that the post-EA studies were sufficient to "cure" any deficiencies in the original EA and to fulfill the requirements of NEPA. The Navy's position on the adequacy of the EA was not revised for the purposes of litigation; that position was the same before and after petitioner's lawsuit was filed. As the district court noted, "the Navy rested its case entirely upon the administrative record." Pet. App. 34a. Thus, the justification for the agency's action and the justification for its litigation position were identical. As the district court recognized, the Navy's "theory of 'cure' " underlay *both* the agency action and its subsequent litigation position. *Id.* at 3a. The Navy's good-faith belief that it had "cured" any defects in the original EA made the Navy's position, as to both the agency action and the litigation, "substantially justified" for the purposes of EAJA.

This Court has held that " 'position' * * * may encompass both the agency's prelitigation conduct and the Department of Justice's subsequent litigation positions," but "only one threshold determination for the entire civil action is to be made." *Jean*, 496 U.S. at 159. Thus, the district court did not abuse its discretion by not making a separate finding on whether there was substantial justification for the Navy's actions prior to the litigation. In any event, the district court's finding that the Navy's theory of "cure" was substantially

justified is a case-specific factual determination that does not warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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